IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-953

GEORGE ROBERT HOBBS, ET AL.,

Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

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Keenan Printing Company 312-648-0050 365

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CITATIONS

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The respondent, People of the State of Illinois, respectfully prays that a Writ of Certiorari to review the judgment and opinion of the Appellate Court of Illinois, Second Judicial District, entered in this proceeding on May 8, 1978, be denied.

I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, and the constitutional test for obscenity pronounced in *Miller* v. *California,* 413 U.S. 15 (1973), on which that statute stands, are so vague and indefinite that they violate petitioners' rights under the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the seizure of business equipment beyond the authority of the search warrant infringed petitioners' rights under the First, Fourth and Fourteenth Amendments to the Constitution of the United States, rendering the search warrant, and the entire search and seizure conducted thereunder, void and invalid.

II.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is complete and accurate in most respects. Respondent wishes to add, however, that on March 4, 1976, a few days after the search of the bookstores in question, the State's Attorney of Winnebago County offered to return to petitioners' counsel all items seized from the bookstores but not named in the search warrants. Counsel for petitioners never reclaimed the additionally seized business property because he decided to do so only if he received a written admission that it had been illegally seized. This property was subsequently returned to its owners by order of court but no admission was made concerning the legality of its seizure.

III.

REASONS FOR DENYING THE WRIT

A.

The Decision Below Was In Conformity With The Pronouncements Of This Court On The Illinois Obscenity Statute In *Ward* v. *Illinois*, 431 U.S. 767 (1977).

Petitioners ask this Court to reverse its decisions in *Miller* v. *California*, 413 U.S. 15 (1973), setting constitutional guidelines for state obscenity laws, and *Ward* v. *Illinois*, 431 U.S. 767 (1977) which applied these guidelines to the Illinois obscenity statute and found that it met constitutional muster.

Peitioners claim that the *Miller* test for obscenity is unconstitutionally vague, and support this claim with references to selected court decisions, law review articles, and letters to *Playboy*. The burden of most of the cited articles is that since *Miller*, "The market for sexually explicit materials is burgeoning." The conclusion drawn is that prosecutors find their local obscenity statutes unworkably vague and cannot deter pornography dealers with selective prosecution of malefactors.

Respondent will not try to answer the policy arguments set fourth by petitioners. If this Court wishes to use this case as a vehicle for re-examining its pronouncements in *Miller*, this is as good a case as any to do so. However, the fact that the dissemination of sexually explicit materials is burgeoning may very well be due, not to any inherent vagueness of the *Miller* guidelines, but to a calculation of the potential profits in pornography sales against the risk of successfully being prosecuted and the relatively minimal penalties applicable. Also, drawing a connection between allegedly vague statutes and a widespread flouting of the same statutes reduces itself to a *non sequitur*. Was the fact that Prohibition laws were recognized more in the breach than the observance due to their vagueness? Is the phenomenon that in many communities the overall crime rate is going down while the incidence of rape is going up due to the vagueness of the rape laws?

Policy arguments aside, this case offers no legal issues not raised in *Ward*. *Ward* found that the same Illinois obscenity statute under which petitioners were prosecuted was not unconstitutionally overbroad where prior Illinois Supreme Court decisions had incorporated the *Miller* guideline as part of the law. *Ward* v. *Illinois*, 431 U.S. at 776.

Relying on *Ward*, a three-judge district court rebuffed a challenge to the Illinois obscenity statute by the present petitioners joined with the corporate owners of the bookstores here involved in *Eagle Books* v. *Reinhard*, No. 76 C 20014 (N.D. Ill., September 15, 1977). (Appendix A) The three-judge court had taken the case on remand from this Court for further consideration in light of *Ward*. *Reinhard* v. *Eagle Books*, 432 U.S. 902 (1977).

Another three-judge panel in a case involving a different set of defendants was asked to dismiss the action against them based on *Ward*. After reviewing the pleading filed by the parties concerning the applicability of *Ward*, the court found that the challenge to the factual validity of Chapter 38, § 11-20, Illinois Revised Statutes had been rejected by this Court. Accordingly, the complaint challenging the statute was dismissed. *Weintraub* v. *Scott*, No. 73 C 1820 (N.D. Ill., November 8, 1977) (Appendix B)

It can be readily seen that the validity of the Illinois Obscenity Statute has been affirmatively decided by *Ward* and subsequent Illinois decisions finding the statute in con-

formity with the strictures of *Miller*. Petitioners have raised no new issues, nor do they make any such claim. Therefore, this Court should deny the Petition For a Writ of Certiorari.

B.

The Seizure Of Items Outside The Scope Of The Warrant Does Not Mandate Suppression Of All Items Seized.

In addition to the films named in the search warrant, Rockford police officers also seized various business equipment belonging to the corporation operating the bookstores. Petitioners contend that the seizure of these additional items render the entire seizure unreasonable thus subjecting all the fruits to suppression. Petitioners assert: "The record is clear, however, that the items were returned over four months later, and only after a court order for such return." (Petition, p. 20) The record was apparently not so clear to the Appellate Court of Illinois. In the Appellate Court opinion appended to the Petition for a Writ of Certiorari the court found: "Defendants concede that none of the items that were improperly seized were admitted into evidence and that these improperly obtained articles were all returned the next day." (Petition, App. 10) And again: "In addition, all the improperly seized objects were returned the next day to the appropriate stores so that the inconvenience to the operation of these businesses was, in our opinion, *de minimus*." (Petition, App. 11)

Actually, the improperly seized items were offered back to petitioners shortly after the seizure, however, their counsel never reclaimed the business property because he decided to do so only if he received a written admission that it had been illegally seized. (Tr. of Arg. in Dist. Ct., pp. 17-18) Petitioners, therefore, are attempting to bootstrap their

own refusal to accept the offered return of the business equipment into a police excess of sufficient magnitude as to warrant suppression of all seized articles, including those specified in the search warrant. Petitioners concede that the items taken in excess of the authority of the warrant were not communicative materials". (Petition, p. 19) However, they disingenuously reason that the seizure of the business equipment prevented them from operating their bookstores in which communicative materials were disseminated. Conceding this point *arguendo*, the fact remains that had they not refused the offered return they would have been out of business only a few days and the damages to their business would have been, as the appellate court correctly termed it, *de minimis*. The refusal to accept the offered return of the equipment was purely a tactical decision. This Court should refuse to permit petitioners to take advantage of their deliberate accrual of damages, especially where the prosecution immediately attempted to rectify the error.

The petitioners were all employees of the corporation which owned the bookstores; none had any ownership interest in the stores or the materials seized therein. The respondents do not contend that the petitioners lacked sufficient *possessory* rights in the premises for standing to object to the use of the seized property in evidence against them. However, the property seized in excess of the authority of the search warrant was not used in evidence and was returned to the corporation. Petitioners do lack the *ownership* interest in the seized business equipment necessary for standing to object to the reasonableness of the seizure of those items. Only items named in the warrant (i.e., films) were introduced against the petitioners and these are the only items petitioners have standing to challenge. Fourth Amendment rights are personal rights which

like some other constitutional rights may not be vicariously asserted. *Alderman* v. *United States,* 394 U.S. 165 (1969).

Because seizure of the business equipment not named in the search warrant amounted to only a *de minimis* inconvenience to the owners of the bookstores, and because the petitioners lack standing to object to the reasonableness of the seizure of these items, this Court should deny writ of certiorari on this issue.

IV.

CONCLUSION

For the foregoing reasons, People of the State of Illinois, Respondent, respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,

DONALD B. MACKAY,

MELBOURNE A. NOEL, JR.,

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188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570.

Attorneys for Respondent.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

EAGLE BOOKS, INC., a Delaware corporation, GEORGE ROBERT HOBBS, JAMES E. TALKINGTON, JACQUELINE D. DAVIS, SHAWNEE ELMORE, ROBERT GOSNEY, MICHAEL MILAZZO, IRA GERRY FERRELL and DAVID J. FOSS,

Plaintiffs,

v.

PHILIP REINHARD, individually and as State's Attorney of Winnebago County, and DELBERT PETERSON, individually and as Chief of Police of Rockford, Illinois,

Defendants.

76 C 20014

ORDER

In light of the Supreme Court's decision in *Reinhard* v. *Eagle Books, Inc.,* 97 S. Ct. 2942 (1977), vacating this

court's order, it is hereby ordered that the injunctive and declaratory relief granted plaintiffs is hereby vacated.

WALTER J. CUMMINGS,
Circuit Judge.

HUBERT L. WILL,
District Judge.

ALFRED Y. KIRKLAND,
District Judge.

ENTER: September 15, 1977

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEO WEINTRAUB, d/b/a L. W. SALES, Chicago, Illinois, MICHAEL MARKWELL, as Manager of the ADULT BOOK & CINEMA, Decatur, Illinois, STEVE ECKERT, as Manager of B. C. SALES CO., Champaign, Illinois,
Plaintiffs,
v.
WILLIAM J. SCOTT, Attorney General for the State of Illinois,
Defendant.
73 C 1820

Before CUMMINGS, Circuit Judge, and WILL and FLAUM, District Judges.

MEMORANDUM OPINION

FLAUM, District Judge. The instant action involves a first amendment challenge to the Illinois obscenity statute, Ill. Rev. Stat., ch. 38, § 11-20. In a letter dated June 27, 1977, the defendant called the court's attention to the recent

Supreme Court decision in *Ward* v. *Illinois*, 97 S. Ct. 2085 (1977), and has urged a dismissal of this action based on *Ward*. After reviewing the pleading filed by the parties concerning the applicability of *Ward* to the case at bar, this court is of the opinion that plaintiffs' challenge to the *facial* validity of section 11-20 has been rejected by the Supreme Court. 97 S. Ct. at 2089 and 2090-91. Accordingly, plaintiffs' complaint is hereby dismissed. *See Eagle Books* v. *Reinhard*, No. 76 C 20014 (N.D. Ill. September 15, 1977) (3-judge court).

It is so ordered.

WALTER J. CUMMINGS, Judge
United States Court of Appeals.

HUBERT L. WILL, Judge
United States District Court.

JOEL M. FLAUM, Judge
United States District Court.

Dated: November 8, 1977